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MAR 12 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Supreme Court Cause No. DA 10-0101

**DEFENDANT A.M. WELLES,
INC.'S MOTION TO DISMISS**

MOTION TO DISMISS

Defendant, A.M. Welles, Inc. (“Welles”) hereby moves to dismiss the Notice of Appeal filed by Charles and Vanessa Lokey (“Lokeys”). This motion is supported by the brief provided below.

STATEMENT OF THE ISSUE

Whether the District Court’s Rule 54(b) Certification Order dated February 16, 2010 and attached as Exhibit A was an abuse of discretion.

STATEMENT OF THE CASE

Lokeys’ injuries arise out of a September 7, 2006 accident; bicyclist Charles Lokey was struck by motorist Andrew Breuner (“Breuner”). Lokeys allege a driver for Welles was negligent in making a courtesy stop and signaling to Breuner that he could turn left without determining whether the turn might create a hazard for Charles Lokey. Welles filed a Motion to Dismiss because there is no Montana precedent for a duty running to the Lokeys from the Welles driver under these circumstances. The District Court agreed, and entered an Order dismissing Welles from the case. Almost one year later, Lokeys moved, and the District Court granted, their Rule 54(b) Certification request.

ARGUMENT

1. Governing Statutes and Rules.

In cases involving multiple claims or parties, Rule 54(b) allows courts to direct an entry of “final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” M. R. Civ. P. 54(b). It is within district court’s discretion to grant or deny a Rule 54(b) Certification request; however, such a decision should not be lightly entered. *Roy v. Neibauer*, 188 Mont. 81, 85, 610 P.2d 1185, 1188 (1980).

In *Roy*, this Court enumerated five factors a district court must consider in granting or denying Rule 54(b) Certification:

1. The relationship between the adjudicated and unadjudicated claims;
2. The possibility that the need for review might or might not be mooted by future developments in the district court;
3. The possibility that the reviewing court might be obliged to consider the same issue a second time;
4. The presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final;

5. Miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense, and the like.

Roy, 188 Mont. at 87, 610 P.2d at 1189 (citations omitted).

The *Roy* court also enunciated three “guiding principles” for Rule 54(b) Certification: (1) the party seeking Certification must convince the district court that the case is “infrequent harsh case” meriting a favorable exercise of discretion; (2) the district court must balance competing factors to determine whether Certification “is in the interest of sound judicial administration and public policy”; and (3) the district court must “marshall and articulate the factors upon which it relied”, facilitating a prompt and effective review. *Roy*, 188 Mont. at 87, 610 P.2d at 1189 (1980) (citations omitted).

2. This Case is Not Appealable.

In their Notice of Appeal, Lokeys apparently realize the District Court’s Order is insufficient and include all briefing. The briefing is irrelevant. The “dispositive issue is whether the court’s certification order meets the criteria set forth in *Roy* and *Weinstein*.” *Kohler v. Croonenberghs*, 2003 MT 260, ¶ 8, 317 Mont. 413, 77 P.3d 531. Here, the Certification Order does not meet that criteria so the appeal must be dismissed.

a. Relationship between claims.

The District Court notes that the relationship between adjudicated and unadjudicated claims is “very close” but that there is a “fine distinction” between the legal theories and claims. Exh. A. The District Court’s analysis is error because this Court not only specifically rejected identical reasoning, but held that such a scenario actually weighs heavily *against* certification. *Weinstein v. University of Montana at Missoula*, 271 Mont. 435, 441, 898 P.2d 101, 105 (1995) (where five varied claims for relief, were “legally distinct” but based on the same facts was a “partial adjudication of a single claim,” militating against Certification).

b. Possibility future developments might moot need for review.

The District Court incorrectly rationalizes that the only way the Welles’ dismissal would be mooted is if a jury finds Breuner 100% liable. The District Court ignores a multitude of outcomes including settlement or a damages award sufficient to compensate Lokeys. Moreover, even if Breuner is found 100% liable, there may still be an appeal, either by Lokeys on damages or by Breuner on either liability or damages. Judicial economy is better served by having all the issues resolved in one appeal. All of these plausible developments counsel against Certification.

c. The possibility that the reviewing court might be obliged to consider the same issue a second time.

In its Order, the District Court merely repeats the boilerplate language of the third *Roy* factor. Exh. A. This is insufficient to merit Rule 54(b) Certification. *In re Marriage of Armstrong*, 2003 MT 277, ¶ 12, 317 Mont. 503, 78 P.3d 1203 (clear articulation of the factors underlying Rule 54(b) Certification required so reviewing court has basis for distinguishing between well-grounded orders and mere boiler-plate approval).

Although not in its reasoning, the District Court recited Lokeys' argument that the courteous driver's duty issue, as one of first impression, will only require review once. Exh. A. However, this Court has held issues of first impression are improper grounds for Rule 54(b) Certification. *In re Marriage of Armstrong* at ¶ 14.

d. Claims or counterclaim which could result in a set-off against the judgment.

There are no claims or counterclaims which could result in setoff. However, to grant Rule 54(b) Certification merely because there is no setoff would open the floodgates for interlocutory appeals. It would also be against the clear policy disfavoring interlocutory appeals. *Monroe*, at ¶ 7.

e. Miscellaneous factors.

It is difficult to tell why the District Court was in favor of Certification under this factor. It appears that it found trial length might be shorter without Welles. However, speculation on trial length is an insufficient basis for Certification. *Monroe* at ¶ 10.

f. Infrequent harsh case.

The District Court was apparently persuaded that this case is the “infrequent harsh case,” in part, because of the reasoning under the first *Roy* factor. As discussed above, that factor is not only unpersuasive, but actually militates *against* Certification.

The District Court also failed to perform the required balancing test. M.R.App.P. 6(6). “The court should weigh the policy against piecemeal appeals against whatever exigencies in the case at hand when entering these orders.” *Monroe*, at ¶ 7 (citations omitted). That the Lokeys waited almost an entire year before moving for Rule 54(b) Certification belies any assertion of exigencies existing in this case. Indeed, Lokeys did not seek Certification until there were other Orders Lokeys wanted to appeal (see Notice of Appeal that seeks review of later ruling on cross motions for summary judgment). More importantly, however, the District Court’s


Order fails to recite any exigency in this case, much less balance it against the stringent policy disfavoring piecemeal appeals. In fact, there is no meaningful distinction between this case and any other negligence case where one defendant is dismissed.

CONCLUSION

For the aforementioned reasons, Welles respectfully requests that the Montana Supreme Court dismiss this appeal and remand this case to the District Court.

DATED this 11th day of March, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was served upon the following by mailing a true and correct copy thereof via U.S. mail, postage prepaid, on the 11th day of March, 2010, as follows, to-wit:

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ALLAN H. BARIS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 10.0 is 1,226 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 11th day of March, 2010.

MOORE, O'CONNELL & REFLING, P.C.

BY: 
ALLAN H. BARIS